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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

DOCKET NO. 82-744

MARILYN L. COWGER,

Appellant,

-against-

CHARLES MONGIN, RICHARD S. ARTHUR, HAROLD N. ARMSTRONG, RICHARD M. GERSHON and PAUL S. MARBLE, CONSTITUTING THE ZONING BOARD OF APPEALS OF THE TOWN OF NISKAYUNA, NEW YORK,

Appellees.

ON APPEAL FROM THE APPELLATE DIVISION OF THE STATE OF NEW YORK

MOTION OF APPELLEES

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MOTION TO DISMISS THE MATTER IN THE SUPREME COURT OF THE UNITED STATES, OR IN THE ALTERNATIVE, TO AFFIRM THE DECISION OF THE NEW YORK STATE COURT OF APPEALS, WHICH DENIED A MOTION FOR LEAVE TO APPEAL.

Appellees, by their attorney, hereby make a motion praying that the Supreme Court of the United States dismiss this matter, or in the alternative, affirm the decision of the New York State Court of Appeals, which denied Appellant's motion for leave to appeal.

The ground for Appellees' motion herein is that there is no substantial Federal question presented.

In the Jurisdictional Statement, Appellant's attorney has made an impassioned plea that Appellant's Constitutional rights were infringed upon and that she was not afforded "due process" of law. Appellees contend that such assertions are wholly without foundation.

For the first time since this proceeding began three years ago, Appellant has stated in her Jurisdictional Statement

that the hearings before the Zoning Board of Appeals of the Town of Niskayuna, New York, were unsatisfactory to her.

This cannot be so. The Town Law of the State of New York and the Zoning Ordinance of the Town of Niskayuna, New York, both require the Zoning Board of Appeals to conduct a public hearing on a matter before it. In this instance the public hearing was spread over three evenings, and at each session the attorney for Appellant was granted unlimited opportunity to speak and to present evidence.

Appellant, in the Jurisdictional Statement, has further contended that her Constitutional rights were denied by lack of a hearing before the New York State Supreme Court.

Appellant, in 1980, appealed the decision of the Zoning Board of Appeals to the

said New York State Supreme Court pursuant to a proceeding provided for in Article 78 of the New York Civil Practice Law and Rules. Included in the statute, at Section 7804(h), is provision for a trial if a triable issue of fact is raised.

The facts were not in dispute in this instance. It has been agreed by both parties that Appellant obtained a permit from the Town of Niskayuna to erect two fences on her real property in a residential neighborhood; one fence, about four feet high, is on the boundary line; the other fence, about eight feet high and topped with two feet of barbed wire, is located about three feet behind the first fence. A neighbor, claiming to be aggrieved, commenced action before the Zoning Board of Appeals, claiming that the permit for the fences should not have been issued because they added to the

"accessory structures" already located in the yard to a degree that was in violation of the Zoning Ordinance.

The Zoning Board of Appeals agreed, and ordered the fences removed.

None of those facts is in dispute. Appellant's Jurisdictional Statement concurs in that. (We do disagree with the editorializing by Appellant's attorney on page 12 of the Jurisdictional Statement, wherein he referred to "a matter of glossing over a little local illegality and corruption,...")

Inasmuch as the facts were not in dispute, there was no need under Article 78 for further trial or hearing. The responsibility of the Supreme Court Justice was to make a determination on the record. This he did.

His decision confirming the action of the Zoning Board of Appeals was upheld

unanimously by the Appellate Division of the New York Supreme Court, Third Judicial Department. As was stated above, the New York State Court of Appeals later denied a motion for leave to appeal.

In the Jurisdictional Statement, Appellant contends that a homeowner living in the same general area as Appellant, and who also was a member of the Zoning Board of Appeals, should not have participated in this matter as it was brought before the Board.

The man in question had served as a member of the Board for several years, and the fact that he lived nearby would not disenfranchise him. If such were the case, then no resident of the Town could serve on the Board, inasmuch as matters before the Board relate to property in the Town of Niskayuna; there is no requirement that a Board member live

any special distance from the property of any individual case. The man in question was not the appellant, nor was it his property that was involved; he had no personal interest in the matter which would disqualify him.

It should be pointed out also that the original Petition to the New York Supreme Court in the Article 78 proceeding made no metion of the position of the above-described Board member. Therefore, it is Appellees' contention that any question about his capacity is untimely.

WHEREFORE, Appellees move for dismissal of the matter in the Supreme Court of the United States, or in the alternative, for affirmation of the decision of the New York State Court of Appeals, which denied a motion for leave to appeal.

Respectfully submitted,

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